

**API Presentation  
DEQ Environmental Advisory Council Meeting  
September 18, 2008**

On behalf of API and its many members, I thank you for holding meetings on the use of Operational Memoranda or Op Memos.

API agrees with the DEQ that these stakeholder meetings are beneficial. We believe that we need to solve problems that are largely caused by the lack of promulgated rules under Part 213. Instead of promulgated rules, the DEQ has relied on informal guidance in the form of Op Memos to administer the Leaking Underground Storage Tank or LUST Program under Part 213.

1. The DEQ's first request to the Council was "define the range of guidance documents used by the DEQ". We are aware of several different types. We understand the DEQ utilizes "internal" guidance documents to provide its Regulators unified interpretation of current directives. In addition, the DEQ requires parties responding at LUST sites – and their qualified consultants – to comply with Op Memos and "draft" Op Memos, including "interim draft" and "final draft" Op Memos. The Op Memos go beyond explaining statutory requirements and agency policies and procedures; rather, they contain substantive requirements not otherwise contained in statute or rule by which the DEQ regulates LUST Sites. In some cases, the DEQ guidance is inconsistent with Part 213 and the RBCA process. The DEQ's practice of applying draft and final versions of these Op Memos to control decision-making at LUST sites results in a lack of consistency, as well as uncertainty and confusion on the part of the responsible parties that are otherwise obligated to address LUST sites in accordance with Part 213.

2. The DEQ's second request to the Council was "describe the benefits and proper uses of guidance documents". We believe some examples do exist where Op Memos are a good idea and would be within the proper limits of illustrating substantive requirements set forth by statute or rule. For example, guidance on a template for a Restrictive Covenant or other institutional controls, such as groundwater prohibition ordinances, would be beneficial. These kinds of model documents would not need to be contained in a promulgated rule, but could be made available to the regulated community through Op Memos, so long as the Op Memos do not create additional requirements not found in Part 213. Another

proper and helpful role for guidance documents or Op Memos would be to describe the procedures and processes by which the DEQ will carry out its duties under Part 213, such as its role in the review and development of institutional controls, its conduct of release audits, and its publication of examples, illustrations and references to rules and statutory provisions to aid parties in their efforts to meet Part 213's substantive requirements. It is important to distinguish, however, that the establishment of any requirements – substantive or procedural – that the DEQ intends to apply to and enforce against the regulated community are not the proper subject of an Op Memo or any other internal or external guidance document. Substantive or procedural requirements should be developed through the formal promulgation of rules under Part 213. Moreover, it is extremely important that stakeholders and the DEQ work together on the development of Op Memos, with the common goal of aiding and enhancing the regulated community's understanding of Part 213, reducing compliance problems and streamlining the site closure process.

3. The DEQ's third request to the Council was "specify the characteristics of guidance documents that are of primary concern to the parties outside the Department and the nature of those concerns". Op Memos are not promulgated regulations and therefore are not binding or enforceable. The original intention of an Op Memo was to clarify, explain and guide the regulated community through the requirements of Part 213. As currently used by the DEQ, however, Op Memos are used to establish new and additional requirements not found in Part 213. Even more problematic is that, rather than promulgating rules under Part 213, the DEQ has instead issued Op Memos to create new requirements, and then relied on those requirements to support agency demands, audits, penalty assessments and claims of non-compliance against responsible parties and qualified consultants.

There are also practical problems arising from the DEQ's use of Op Memos to administer its Part 213 Program. Because Op Memos are not rules and in many instances are issued only in "draft" form, they may be modified regularly. Work is completed under current Op Memo guidance. The DEQ project manager may declare a deficiency in that work if a new, updated Op Memo is in effect (or contemplated) at the time of a DEQ review or audit, which may occur years after the work is initiated or completed. This moving target approach frustrates the orderly and consistent conduct of LUST site work and the common goal of achieving closure.

In addition, our experience has been that DEQ Districts are not consistent in their application or interpretation of the Op Memos. This creates uncertainty and

inefficiency, by forcing responsible parties to adopt different approaches for the same LUST site issues just because Op Memos appear to be followed one way in one District, but another way in another District. Promulgated rules would solve this problem and establish uniform requirements for the DEQ to administer and the regulated community to follow.

4. The fourth request to the Council was “describe how the DEQ can address such concerns, including issues related to the development and use of criticized documents”. We do not feel that the DEQ performs effective peer reviews when creating Op Memos. The DEQ does not follow formal rulemaking procedures, so there are no assurances that input from the regulated community is valued or used or even considered by the DEQ. Moreover, the peer review panels convened by the DEQ to develop Op Memos appear to be heavily weighted with regulatory staff, resulting in the regulated community having no meaningful role in the process.

Another significant problem resulting from the DEQ’s preference to regulate LUST sites through Op Memos instead of rules promulgated under Part 213 is that the DEQ has used such an approach to exceed its authority under Part 213 and under the Part 215 rules governing qualified consultants and certified professionals. This occurs when the DEQ pressures consultants performing LUST site work to comply with Op Memos by threatening the suspension or revocation of their certification. The DEQ takes the position that the Part 215 rules require a consultant performing LUST site work to comply with all department guidance and policy applicable at the time the work was completed. However, Part 215 rules do not require a consultant to follow requirements contained in Op Memos that are not otherwise set forth in Part 213 itself or any applicable rule. Nevertheless, the DEQ has repeatedly claimed that the Part 215 rules give consultants no choice but to strictly adhere to all requirements set forth in the Op Memos, putting consultants in the conflicted position of accepting requirements that have no force of law or legal applicability to the LUST site in order to preserve their eligibility to perform LUST site work. Essentially, the DEQ has been using an incorrect interpretation of the Part 215 rules to impose Op Memo requirements on LUST sites which are not otherwise required by any applicable statute or rule. This has the effect of making Op Memos enforceable, in spite of the DEQ’s own insistence that Op Memos are not legally enforceable

The most direct and effective remedy for these deeply rooted and systemic problems is to amend Part 213 to *require* the DEQ to promulgate rules under Part 213, including rules specifying requirements for Final Assessment Reports (FAR)

and Corrective Action Plans (CAP) that are consistent with the American Society for Testing and Materials Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites (ASTM E 1739-95 RBCA), which is formally adopted and incorporated by Part 213. The creation of Part 213 rules will provide the certainty regarding applicable requirements that is currently lacking in the Part 213 Program and will afford the regulated community the proper opportunity to participate in the development of these requirements.